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Supreme Court, U.S.
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No. 03-1238

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

WILLIAM A. NORRIS
JOEL M. COHN
REX S. HEINKE
L. RACHEL HELYAR
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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SUPPLEMENTAL BRIEF

Petitioner IBP, inc. ("IBP") submits this supplemental brief in response to the brief for the United States.

I. THE UNITED STATES HAS CONFIRMED THAT REVIEW OF THE "WALKING TIME" ISSUE IS WARRANTED.

The United States acknowledges that there is an irreconcilable conflict among the courts of appeals as to the "walking time" issue raised in the first question presented, and that this issue affects the entire meat-processing industry, is important to the administration of the Fair Labor Standards Act ("FLSA"), and "warrants the Court's review." U.S. 11-12. The United States likewise confirms that this Court's resolution of this issue will have sufficiently concrete consequences for the parties "to prevent the Court's ruling from being advisory in an Article III sense." *Id.* at 14. The United States stops short of urging the Court to grant the petition, however, based on concerns that those consequences are not concrete enough to render this case "an appropriate vehicle to resolve" the important issue presented. *Id.* at 12. These prudential concerns, which arise from a curious, non-binding "representation" by respondents' counsel to the government, *id.* at 14, are misplaced. In fact, both parties have significant incentives to litigate this case in a manner that ensures a full adversarial presentation of a significant and unsettled issue of federal law.

1. The United States endorses each of the petition's three core arguments justifying review of the "walking time" issue. First, the United States agrees that "there is a conflict in the circuits." *Id.* at 7; *id.* at 12 ("Because the circuits have divided on [the walking time] issue . . . it warrants the Court's review."). Specifically, the United States agrees that the holding of the First Circuit's decision in *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274, 281 (1st Cir. 2004), *petition for certiorari filed* No. 04-66 (U.S. July 8, 2004), *cross-petition*

for certiorari filed, No. 04-231 (U.S. Aug. 16 2004), "is directly inconsistent with the holding of the Ninth Circuit in this case" and, moreover, that "the court below and the First Circuit in *Tum* specifically acknowledged their disagreement" on the walking time issue. U.S. 10. The United States also recognizes that the Tenth Circuit's decision in *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), is in "tension with the decision below, and enhances the need for resolution of the question presented." U.S. 11. The United States advises that this conflict is ripe for review. *Id.* at 7-8.

Second, the United States agrees that the walking time issue "is one of ongoing public importance [that] warrants the Court's review." *Id.* at 12; *id.* at 7 (noting its "recurring importance"). For example, "[b]ecause of that issue's importance to the administration of the FLSA, the Secretary of Labor has devoted considerable attention to it." *Id.* at 11. Indeed, the Secretary is involved in significant ongoing litigation involving this issue nationwide, including other litigation against petitioner's parent company (discussed below). *Id.* at 11-12. Moreover, the United States acknowledges that the issue "has considerable importance to the employers and employees involved in the chicken and beef industries." *Id.* at 11. This acknowledgement also weighs heavily in favor of review. See Robert L. Stern et al., *Supreme Court Practice* 243 (8th ed. 2002) ("The importance of the issues involved in the case as to which review is sought is of *major significance* in determining whether the writ of certiorari will issue.") (emphasis added).

Third, the United States agrees that there is no jurisdictional impediment to accepting review. Namely, this case is within "the scope of the Court's Article III jurisdiction" and a decision from this Court would not be merely "advisory in an Article III sense" in the circumstances presented. U.S. 14.[1]

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[1] Although the United States repeatedly refers to this Court's review potentially having no impact on the district court's "judgment," *e.g.*, U.S. 8, it plainly is using this term to suggest that the Court's review might not change respondents' money damages, not to suggest that review would have no bearing on the Ninth Circuit's decision that petitioner violated federal law or the precedential value of the decision below in the Ninth Circuit, *see id.* at 14.

2. Nonetheless, the United States speculates that, on an eventual remand, the district court *might* enter an alternative judgment in which damages are derived solely from respondents' state law claims and that, for this reason, "prudential considerations *may* counsel against granting review" on the walking time issue. U.S. at 14 (emphasis added). These prudential concerns are misplaced.

Although the district court did announce an alternative damages calculation comprised entirely of damages under state law, Pet. App. 74a, the court of appeals did not remand for entry of this alternative amount; it remanded "for recalculation of damages," *Id.* at 34a. Indeed, the United States acknowledges that respondents have two compelling reasons for seeking entry of a judgment that is predicated, in part, on their federal "walking time" claims. First, respondents could "seek entry of a judgment awarding the same amount of damages, but urge that it be based expressly on both federal and state law, thereby maximizing their chances of receiving the collateral estoppel benefits of the federal law rulings." U.S. 13. Second, respondents could seek entry of a judgment that would award them "pre- and post-shift overtime damages based on the FLSA, together with meal break overtime damages based on state law"—an award that would "lead to an *increase* in the total damages" they receive because their federal law damage award, but not their state law damage award, provides double damages. *Id.* (emphasis added).

Nevertheless, the United States suggests that entry of such highly favorable (to respondents) damages awards is not "likely" because "[r]espondents have represented to us" that upon remand "they will seek entry of the alternative [money]

judgment proposed by the district court and nothing more." *Id.* at 14. Thus, the United States suggests that it is "likely that the Court's resolution of the walking time issue would not affect the [money] judgment that will be issued on remand." *Id.*; *id.* at 12.

Respondents' extraordinary, off-the-record suggestion of what they might do on remand is insufficient to immunize this case from review. Respondents made no such representation to the court of appeals; instead, they vigorously litigated the "walking time" issue below and obtained a federal law decision that plainly warrants this Court's review. Moreover respondents' counsel have made no such representation to this Court, and petitioner has no guarantee that any or all respondents would feel themselves bound to this unsworn remark after remand. More fundamentally, this representation is inconsistent with the interests of some respondents, and the duties class counsel and named plaintiffs owe to other class members. See generally Fed. R. Civ. P. 23(e)(1)(A) ("The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class."); *id.* 23(a) (class representatives must "fairly and adequately protect the interests of the class"); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 321 (3d Cir. 2001) ("the aggregate nature of the class action in no way implies that the court's fiduciary duties to the whole class are somehow greater or more important than its duties to the individual members of the class").

Accordingly, it is far from clear that respondents' counsel and the named plaintiffs are even authorized to seek less than all to which a given class member might be entitled, or why they would even seek to do so. Nor is it clear that they are free to relinquish possible collateral estoppel arguments on behalf of each member of the class, particularly when follow-on litigation involves virtually the same parties and same walking time issue. Indeed, in *Chavez* v. *IBP, inc.*, No. CT-01-5093-RHW (E.D. Wash. filed Nov. 5, 2001), a case that

the United States does not discuss, a class of employees from the same plant is pursuing the same walking time claim in the context of the same or similar clothes-changing activities. The same counsel represent respondents and the plaintiff class in the *Chavez* follow-on litigation, and two of the named class representatives in this case are also named class representatives in *Chavez*. In addition, of the 815 class members in this case, 646 are participating in *Chavez*, and 400 of these are asserting FLSA claims as to which they seek damages commencing the day after the damages period in this case. For this reason, the *Chavez* plaintiffs (and their counsel) have powerful reasons to seek to ensure that any judgment entered in this case bears collateral estoppel effect on the walking time claims asserted in *Chavez*.

Thus, it is not at all "likely" that the district court will enter the same judgment "regardless of how this Court rules on the walking time issue." U.S. 14. Respondents have strong financial incentives, and even ethical obligations, to seek entry of an FLSA-based judgment that enhances their damages recovery in this case and maximizes their chances of success in follow-on litigation. Those same incentives ensure that they will be zealous advocates before this Court on the walking time issue.

3. Even if respondents did not have powerful incentives to seek entry of a damages award based on federal law, the judgment below has practical significance to IBP that eliminates any "prudential" reasons for declining to review the important federal issue posed in this case. The United States acknowledges that a favorable ruling on the merits by this Court "would eliminate any possibility that the district court's and the court of appeals' federal walking time rulings would have collateral estoppel effects on petitioner in other cases." U.S. 14; see generally *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984). It likewise acknowledges that "[s]uch a ruling would also eliminate any possibility that the FLSA violation found in this case could serve as a basis for DOL to

impose a civil penalty in the event that petitioner violates the FLSA in the future." U.S. 14.

Both of these consequences are enormously important to IBP. IBP and its corporate parent, Tyson Foods, Inc. (which acquired IBP in September 2001) are defendants in more of these cases than any other food processor in the country. One such case, cited by the United States, is *Chao* v. *Tyson Foods, Inc.*, No. 02-CV-1174 (N.D. Ala. filed May 9, 2002), in which the Secretary of Labor seeks damages for employees at one plant and nationwide injunctive relief. In that case, Tyson Foods reached agreement with the Secretary to stay the litigation pending this Court's determination of this petition because of its potential to affect substantially the Secretary's case. Other donning and doffing cases against Tyson Foods and IBP also could be affected substantially.[2] Thus, Tyson Foods shares the same interest as IBP in fully and zealously advocating before this Court on the walking time issue if the Court grants the petition in this case.[3]

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[2] *See Fox* v. *Tyson Foods, Inc.*, No. 99-CV-1612 (N.D. Ala. filed June 22, 1999) (plaintiffs from eight plants seek to certify nationwide action on behalf of current and former employees at 54 plants); *De Asencio* v. *Tyson Foods, Inc.*, No. 2:00-cv-04294-RK (E.D. Pa. filed Aug. 22, 2000) (one plant), *presently on remand from interlocutory appeal*, 342 F.3d 301 (3d Cir. 2003); *Jordan* v. *IBP, inc.*, No. 02-CV-1132 (M.D. Tenn. filed Nov. 21, 2002) (one plant).

[3] For all of these reasons, this case is not at all like *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959). In *The Monrosa*, there was no possibility that review of the question presented could have led to a different result: the plaintiff sought the same relief under two separate claims, and this Court's conclusion that the plaintiff could seek that relief in an in rem action obviated any need to decide whether the plaintiff could also pursue the same relief through an in personam action. Accordingly, neither of the parties had any incentive to litigate the in personam issue. Here, by stark contrast, the United States acknowledges, and respondents do not deny, that some members of the class can receive more money if they prevail on their federal claim. Both parties, therefore, have ample incentives to litigate the federal issue, and this Court's resolution of that issue would plainly be a "judicial, not simply [an] administrative or managerial," act. *Id.* at 184.

Finally, the United States does not urge the Court to deny the petition. Thus, the only real question is whether the walking time issue would be better litigated in this case or in *Tum*. This case is clearly a better vehicle for resolving the walking time issue than *Tum*, which involves only a small number of claimants and vastly smaller potential damages. The appendix in that case suggests that only 25 named plaintiffs went to trial. *See* Pet. App. 20a & n.1, in *Tum* v. *Barber Foods, Inc.*, No. 04-66 (U.S. filed July 8, 2004) (magistrate judge's opinion noting that Barber Foods moved for summary judgment on claims of 41 named plaintiffs, and further recommending dismissal of 16 plaintiffs as discovery sanction). We are informed by counsel for Barber Foods that 22 plaintiffs remain in the case, that the damages claimed by them was approximately $70,000, and that Barber Foods has no other similar cases pending against it. Thus, if the Court were to accept the United States' suggestion and grant review in *Tum* instead of this case, the advocacy on this important issue would be controlled by a party whose interest candidly is trivial compared to that of IBP and Tyson Foods.[4]

II. THE COURT SHOULD GRANT THE PETITION AS TO THE SECOND QUESTION PRESENTED.

1. The United States does not refute IBP's showing that there is confusion in the lower courts as to whether this Court's decision in *Christensen* survives *Mead*, *Barnhart* and *Alaska Department of Environmental Conservation*. See Pet. 19-25. Indeed, the United States concedes that there is significant ambiguity about the extent to which at least "some opinion letters . . . might warrant *Chevron* deference" and that it is an open question whether *Christensen* already has been at least "qualifie[d]," if not overruled, by this Court's

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[4] Of course, should the Court agree with the United States' suggestion and grant the petition in *Tum*, IBP agrees that this case should be held pending the disposition of that case.

subsequent cases. U.S. 17. Similarly, the United States does not deny that there is significant confusion concerning the degree of deference due less formal agency interpretations of ambiguous statutory terms, and that this issue is an important question of federal law.

Instead, the United States suggests (inexplicably) that the Court should not review this issue because petitioner has not made "the kind of compelling case necessary to justify overruling a decision of this Court." *Id.* at 8. This suggestion confuses the showing IBP must make to prevail on the merits with the showing necessary to justify review of the issue. IBP has more than satisfied the latter standard, which is the relevant standard for present purposes.

The United States further suggests that the Court permit "further ventilation in the courts of appeals." *Id.* at 18. This suggestion ignores the expressions of frustration and open calls for clarification by prominent jurists and commentators alike, Pet. 20-22, both as to the broader deference issue, and the legal status of the very opinion letters at issue in this case. These extraordinary requests for this Court's help demonstrate that this is not the typical situation in which "percolation" will result in crystallization of an issue. Instead, review of this important question is needed now to assist lower courts that are floundering without guidance.

2. The United States' suggestion that the deference issue was not squarely raised below is simply mistaken. As demonstrated in petitioner's reply brief, the issue of what level of deference the courts should give the Department's June 6, 2002 opinion letter was raised at the earliest instance and in adequate detail. Pet. Reply 7-8 & nn.4-5. Petitioner addressed the *Barnhart* factors in substance, if not by name, before the court of appeals.[5] Opp. App. 37a (excerpt from

[5] The *Barnhart* factors are: (1) "the interstitial nature of the legal question"; (2) "the related expertise of the [a]gency"; (3) "the importance of the question to the administration of the statute"; (4) "the complexity of that administration"; and (5) "the careful consideration the [a]gency has given the question over a long period of time." *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002).

petitioner's reply brief to court of appeals below); *id.* at 42a-43a (excerpt from petitioner's petition for rehearing to court of appeals below). In addition to raising these very issues, petitioner also cited cases from the *Chevron* line of authority. See *id.* at 37a; *id.* at 42a-43a. Accordingly, there can be no serious question that this issue was pressed below.

3. The United States' efforts to distinguish the Fifth Circuit's decision in *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (per curiam), are inconsistent with its own analysis of the conflict of the walking time issue. The United States relies on the fact that the items of attire in *Bejil* were different from those at issue in the decision below. Specifically, the Fifth Circuit in *Bejil* held that certain "sanitary garments" (such as lab coats, shoe coverings, and hair and beard coverings) were "clothes" within the meaning of Section 3(*o*), whereas in this case the Ninth Circuit held that certain protective attire (including metal aprons and Kevlar gloves) were *not* "clothes" under that provision.

But the facts need not be identical for a conflict in the governing rule of law to be palpable. Indeed, earlier in its brief, even though the United States suggested that the factual differences between *Tum* and the decision below were so stark that the cases might be "capable of being reconciled on their facts," U.S. 9, it explained that there was still a true conflict warranting certiorari because the First Circuit's "holding is directly inconsistent with the holding in the Ninth Circuit in this case," *id.* at 10. Here as well, the holding of *Bejil* is that vocational garments that are worn atop other attire are still "'clothes' under § 203(*o*)." *Bejil*, 269 F.3d at 480 n.3. Applying this principle here, the result would have been the opposite: respondents' protective attire would have been viewed as no less clothing merely because they were worn over non-vocational garments. A number of other

courts have reached the same result. See Reply Br. 8 n.6; see also *Turner* v. *City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001) (correctional officer uniforms, including leather gun holsters worn over top layer of clothing, treated as "clothes" under § 203(*o*)).

* * * *

The petition raises two issues worthy of this Court's review. The United States' reliance on prudential concerns leads to precisely the opposite conclusion offered by the government. The most prudent course would be to grant in this case where petitioner has significant experience litigating these issues, both sides have a keen interest in having them resolved, and are well-equipped to assist the Court in its consideration of this case on the merits.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM A. NORRIS
JOEL M. COHN
REX S. HEINKE
L. RACHEL HELYAR
AKIN GUMP STRAUSS
HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

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* Counsel of Record